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On, April 21, 1994, Edward J. Murphy, the John N. Matthews Professor of Law, announced his retirement from the Notre Dame Law School faculty. Professor Murphy has taught more students than any professor in the history of the Law School.

Professor Murphy received his B.S. and LL.B from the University of Illinois. Admitted to the Illinois Bar in 1951, he spent three years in private practice in Springfield, Illinois. From 1954 through 1957, he clerked for Justice H.B. Hershey of the Illinois Supreme Court. Professor Murphy came to Notre Dame in 1957. He served as Acting Dean in 1971 and directed the Notre Dame Summer Program in Japan in 1974. He has taught Contracts, Jurisprudence, Negotiable Instruments, and Remedies. He is the co-author of Studies in Contract Law, now in its fourth edition, and Sales and Credit Transactions Handbook.

The students of the Law School are forever grateful to Professor Murphy for his guidance, friendship, and inspiration.

ESSAY

The Sign of the Cross and Jurisprudence

*Edward J. Murphy**

Every class I have taught in the Notre Dame Law School has begun with the same action and the same words. I have made the ancient Sign of the Cross, while saying: "In the name of the Father, and of the Son, and of the Holy Spirit."

What has this to do with law and legal education? A good question. And what better time to respond than on this special anniversary of the Law School, a school which publicly and without apology proclaims its religious roots.

By this sign one confesses Jesus Christ as one's redeemer and acknowledges that His is the only name by which we are to be saved.¹ With St. Paul, one says: "May I never boast of anything but the cross of Our Lord Jesus Christ!"²

The practice of marking one's forehead with the Sign of the Cross evidently goes back to apostolic times.³ One of the early Church fathers, Tertullian (160-230), a lawyer before becoming a priest, observed: "In all our travels and movements, in all our coming in and going out, in putting on our clothes and shoes, at the bath, at the table, in lighting our lamps, in lying down, whatever employment occupies us, we mark our forehead with the Sign of the Cross."⁴ Another of the early scholars, Origen (185-255), wrote in his commentary on Ezekiel: "The letter *Thau* bears a resemblance to the figure of the Cross; and this prophecy (Ezech. ix. 4) is said to refer to the sign made by Christians on the fore-

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Professor Murphy joined the Notre Dame Law School faculty in 1957, and, since the fall of 1958, every student who has entered the Law School has been in his Contracts class. He has taught more Notre Dame law students than any other teacher in the history of the school. Ed.

1 Acts 4:12.

2 Gal. 6:14.

3 See generally 13 THE CATHOLIC ENCYCLOPEDIA 785-87 (1912).

4 Tertullian, *De Cor. Mil.* 3 (quoted in BERTRAND L. CONWAY, THE QUESTION BOX 348 (1929)).

head, which all believers make whatsoever work they begin, and especially at the beginning of prayers, and of holy reading."⁵

By beginning a class with the Sign of the Cross, one makes a statement about salvation through Jesus Christ and of one's obligation to bring every thought into captivity to Him.⁶ But we must also consider the words that accompany this powerful sign: "In the name of the Father, and of the Son, and of the Holy Spirit."

According to the psalmist, it is only the fool who says there is no God.⁷ Philosophers, ancient and modern, have offered many arguments for the existence of God. But no philosopher ever undertook to demonstrate that God is three persons in one divine nature. We simply would not know of the Trinity unless God had chosen to tell us about it. For only through revelation can it be known that the one divine nature is possessed in its totality by three distinct persons.

I. CENTRALITY OF THE TRINITY

The Trinity is *the central fact of all reality*. There is nothing more basic than this. It is a fact of such overriding significance that everything else must be seen in relationship to it.⁸ Thus, when you and I look at something, be it a sunset, a person, an historical event . . . *anything*, we must in a sense see *through* that person or event to the Father, the Son and the Holy Spirit. For it is the triune God (1) who created the world *ex nihilo* (out of nothing), (2) whose providence extends "from end to end mightily and governs all things well,"⁹ (3) who enables us to be reborn into a new life which makes us no less than "children" of God¹⁰

5 Origen, *In Ezech. ix* (quoted in CONWAY, *supra* note 4, at 348-49). The forehead sign came to be applied to other parts of the body. Evidence of this development can be seen in the writings of St. Ambrose of Milan (304-397). 10 THE CATHOLIC ENCYCLOPEDIA FOR SCHOOL AND HOME 98 (1965).

6 2 Cor. 10:5.

7 Psalm 14:1.

8 "God is not only a fact of religion: He is a fact. Not to see Him is to be wrong about everything Nothing is rightly seen save in the totality to which it belongs; no part of the Universe is rightly seen save in relation to the whole. But the Universe cannot be seen as a whole unless one sees God as the Source of the existence of every part of it and the center by relation to which every part is related to every other." F. J. SHEED, *THEOLOGY AND SANITY* 7 (1946). "Because God is sovereign, there is nothing in all creation which can be understood in anything other than theological terms. All reality is inescapably a theological fact." R. J. RUSHDOONY, *INFALLIBILITY: AN INESCAPABLE CONCEPT* 37 (1978).

9 *Wisdom* 8:1.

10 1 *John* 3:1.

and "sharers of the divine nature,"¹¹ and (4) who is our ultimate lawgiver and final judge!

By affirming the Trinity as we begin a law class, we make a fundamental jurisprudential statement. We acknowledge God as sovereign, and we pledge to model our work in the law upon what we know of His law-order.

We can never reflect too much upon the fact that God is a *personal* being, not some kind of impersonal force. The "God of the philosophers" pales in comparison to the "God of the scriptures." Only of the latter has it been said: "Yet not a single sparrow falls to the ground without your Father's consent. As for you, every hair of your head has been counted; so do not be afraid of anything."¹²

If one is not able to "see through" everything in the universe to a personal creator (to a "Father who art in heaven"), one generally perceives a universe of chance which is both impersonal and irrational. If we are able to see everything in the context of the triune God and His activity, the universe is totally real, totally rational, and totally meaningful. In the Genesis account, we read: "God looked at everything He had made, and He found it very good."¹³ There is, to be sure, evil in the world. But evil is not inherent in God's creation; it is not metaphysical. Rather, it is moral or ethical, brought about by sin, a failure of the creature to conform to the law-order established by the Creator.

Obviously, the doctrine of creation has far-reaching legal implications. It has rightly been said that

every political-economic theory rests upon a foundation of ownership. Whoever owns society will make the rules or laws by which society is to be governed. If man is the owner of society, then man will make the laws necessary for social organization. If God is the owner of society, then God will rule society by his standards and laws.¹⁴

If God is the owner, He is in charge. He is the ultimate lawgiver and supreme governor. Whatever authority humans possess is both derivative and limited.

It follows that law and jurisprudence must be God-centered; *i.e.*, "Thy will be done," not "my (or our) will be done." We must

11 2 Peter 1:4.

12 Matt. 10:29-31.

13 Genesis 1:31.

14 EDWARD A. POWELL, *The Rule of Law*, THE CHALCEDON REPORT, Aug. 1978, at 1.

never lose sight of the divine source of all legitimate law. Viewed in this manner, law is personal, not mechanistic. Rather than arbitrary rule or philosophical abstraction, it is historical command of our Father in heaven.

I once asked my Jurisprudence students if they knew any songs about the law or lawyers. The only response I got was "I shot the Sheriff"! Evidently, we do not sing songs about law. But this was not always the case. The longest psalm in the Bible is *Psalm 119*, and it is a song in praise of God's law. Here are a few of the verses:

Instruct me, O Lord, in the way of your statutes,
that I might exactly observe them.
Give me discernment that I may observe your law
and keep it with all my heart.
Lead me in the path of your commands,
for in it I delight.
Incline my heart to your decrees
and not to gain.
Turn away my eyes from seeing what is vain;
by your way give me life.
Fulfill for your servant
your promise to those who fear you.
Turn away from me the reproach which I dread,
for your ordinances are good.
Behold, I long for your precepts;
in your justice give me life.¹⁵

Could it be that we do not sing about our law because we do not believe there is much to sing about? We live in an age largely dominated by man-made or humanistic values. Our laws, which reflect those values, tend not to strike a responsive note in our hearts, in our total being. For are we not inclined to see our codes, statutes, regulations and decisions as purely conventional, unrelated to any overall pattern, purpose or direction? The psalmist saw in law a statement of how things really are; he saw a law-order ordained by a personal God and absolutely binding on people and nations. Our standards are generally relativistic and pragmatic; therefore, our law is, in the main, imperialistic, its binding force solely dependent upon coercive impositions of human power.

15 *Psalm 119:33-40.*

When the psalmist reflected upon God's law-order he was moved to sing: "Behold I long for your precepts, in your justice give me life." The law found a response in his heart, because the same God who made his heart made the laws. Life is a gift of God, who has ordained how it is to be lived and perfected. All of His laws are designed to assist men and women in the attainment of a supernatural destiny. And that is really something to sing about!

II. REVELATIONAL JURISPRUDENCE

Every law-order, of whatever kind, is "revelational" in that it derives from some recognized sovereign ultimate. Indeed, when one identifies the ultimate source of law for a person or a society one identifies the "god" of that person or society.¹⁶ It is for this reason that *all* legal systems are *religious* establishments, and all serious jurisprudential conflict is *theological* in nature. In short, the question for each of us is not *whether* we will be guided by an ultimate authority, but *who* or *what* that authority will be. Is it to be God? Or ourselves? Or the state? Or a political party? Or a race? Or an economic class? Or the media? Or the stars? Or Satan? Or what? Each of us will choose, and the choice will be consequential.

Everyone has a "god," an ultimate whose word is final. This entity declares various "truths", which become the foundation, the premises, of one's legal philosophy. Hence, all legal systems have a common structure. At the apex are the assumptions and basic values, which are, as it were, accepted on faith. From these are derived moral norms and ethical principles, and the law reflects this morality. For all law involves the imposition of someone's morality upon others. This, I submit, is how it works in every legal system and why it is absolutely crucial that the presuppositions of a legal order be identified.

Professor Harold Berman describes basic shifts that have occurred in Western legal philosophy since the Enlightenment:

With the Enlightenment, Western legal philosophers sought a new ultimate authority. Some found that ultimate

16 "If there is no higher law beyond man, then man is his own god, or else his creatures, the institutions he has made, have become his gods. When you choose your authority, you choose your god, and where you look for your law, there is your god." R. J. RUSHDOONY, *LAW AND LIBERTY* 33 (1966).

authority in politics, others found it in morality, still others found it in history. The positivists say that the ultimate source of law is the will of the lawmaker and its ultimate sanction is political compulsion: They deify the state. The naturalists say that the ultimate source of law is reason and conscience and its ultimate sanction is moral condemnation: They deify the mind. The historicists say that the ultimate source of law is national character, or the historically developing traditions of the people, or what in the United States is sometimes called the unwritten constitution, and that its ultimate sanction is acceptance or repudiation by the people: They deify the people, the nation.¹⁷

In formulating a legal philosophy, the Christian must, of course, begin with the triune God and His revealed plan for ordering all things to the attainment of their ends. Law is central to this plan, just as in any plan of governance.

God wills that certain things happen *necessarily*. With respect to other matters, and here we touch upon human actions, He wills that they happen *freely*, through choice. In the first category are physical laws. The tree, for example, cannot disobey. In the realm of human action, however, the creature may disobey a law of God, even though one brings harm upon oneself in so doing and is subject to the judgment of God.

How do we come to know this law? In a word, through divine revelation. First, there is the "natural law," the law which St. Paul said is "written in our hearts"¹⁸ and discoverable by exercise of reason. Human persons, created in the image of God, have this knowledge as a part of their nature. It is built into the very fibre of their being. St. Thomas Aquinas teaches: "As to the common principles, the natural law, in its universal meaning, cannot in any way be blotted out from men's hearts."¹⁹ But, he notes realistically, the "secondary precepts" of the natural law can be blotted out from the human heart by "evil persuasions" or by "vicious customs and corrupt habits."²⁰

17 Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 783 (1988) (footnote omitted).

18 Rom. 2:15.

19 ST. THOMAS AQUINAS, SUMMA THEOLOGICA I-II, Q. 94, art. 6. In his recent encyclical VERITATIS SPLENDOR, Pope John Paul II states: "[N]o darkness of error or of sin can totally take away from man the light of God the Creator. In the depths of his heart there always remains a yearning for absolute truth and a thirst to attain full knowledge of it." JOHN PAUL II, VERITATIS SPLENDOR para. 1 (1993).

20 AQUINAS, *supra* note 19, at I-II, Q. 94, art. 6.

God has not been content with this indirect or implicit revelation.²¹ He has, in addition, disclosed portions of His plan for us, or elements of His law-order, in a direct, explicit manner through Biblical revelation and the teaching authority which he established, the Church.²²

This explicitly revealed law can be considered in terms of the historical period of promulgation: the old law of the Old Covenant or Old Testament and the new law of the New Covenant or New Testament. All of this divine "positive" law is from God and merits our study.²³ For even if a particular precept of the old law is no longer binding in view of the new law of Christ, it can still be instructive. I am reminded of a poster of a little boy, with the caption reading: "God made me, and He don't make junk!" Before we dare to discard or ignore any law of God, we ought to at least attempt to learn the reason for its initial promulgation. It might, to use contemporary language, highlight some element of public policy which will provide guidance in critiquing our law and in effecting legal reform.

Clearly, by giving serious attention to divine revelation, one looks at legal questions in a different light. If, for example, one recognizes God as the creator of human life and the only one with full authority to ordain how that life should be lived and when it may lawfully be taken, this will surely influence one's views

21 On the first page of his monumental *SUMMA THEOLOGICA*, St. Thomas Aquinas gives this succinct explanation: "Even as regards those truths about God which human reason could have discovered, it was necessary that man should be taught by a divine revelation; because the truth about God such as reason could discover, would only be known by a few, and that after a long time, and with the admixture of many errors." *Id.* at I, Q. 1, art. 1.

22 "No believer will wish to deny that the Magisterium of the Church is competent to interpret even the natural moral law. It is, in fact, indisputable, as Our Predecessors have many times declared, that when communicating to Peter and the Apostles His divine authority and sending them to teach His commandments to all nations, Jesus Christ constituted them as guardians and authentic interpreters of all the moral law — namely, not only of the law of the Gospel, but also of the natural law, which is likewise an expression of God's will and whose faithful fulfillment is equally necessary for salvation." POPE PAUL VI, *HUMANAE VITAE* para. 4 (1968). See generally, CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 185-224 (1993).

23 "Even if moral-theological reflection usually distinguishes between the positive or revealed law of God and the natural law, and, within the economy of salvation, between the 'old' and the 'new' law, it must not be forgotten that these and other useful distinctions always refer to that law whose author is the one and the same God and which is always meant for man. The different ways in which God, acting in history, cares for the world and for mankind are not mutually exclusive; on the contrary, they support each other and intersect." JOHN PAUL II, *supra* note 19, at para. 45.

on abortion, euthanasia, fetal experimentation, *in vitro* fertilization, capital punishment, and a whole host of other life-and-death issues. If from revelation one concludes that the family is the central governmental unit, this will affect one's thinking on parental rights in education, divorce, adultery, surrogate mother contracts, homosexuality, and many other matters. In brief, one will critique every legal proposal in terms of conformity to what is known of the law of God.

Finally, there is human law, enactments of governing institutions whose power and authority derive from God. These institutions, whether acting as lawgiver or governor, are not autonomous; they must strive to pattern their legal and governmental activity upon the divine plan. Thus, their role is essentially *ministerial* or *administrative*. There is, in this providential arrangement, an important role for human delegates, but their power and jurisdiction are limited, and, with respect to God, they are in inferior and subordinate positions. It follows that if they act within the scope of their authority, their enactments are binding the same as if such decree emanated directly from God without human mediation. If, on the other hand, a law is in conflict with a divine command, it is not really a law at all.

Writing from a jail in Birmingham, Alabama, Dr. Martin Luther King, Jr. explained it this way:

You express a great deal of anxiety over our willingness to break laws. That is certainly a legitimate concern One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: an unjust law is a human law that is not rooted in eternal law and natural law.²⁴

24 MARTIN LUTHER KING, JR., *Letter From Birmingham Jail*, in *WHY WE CAN'T WAIT* 82 (1963). In his *TREATISE ON LAW*, St. Thomas distinguishes two ways in which a law may be unjust; *viz.*, by being contrary to *human* good and by being contrary to *divine* good. A

In his *Treatise on Law*, St. Thomas describes two techniques by which human law is derived from divine law; *viz.*, as "a conclusion from premises" or "by way of determination of certain qualities."²⁵

The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape.²⁶

Lawmaking, whether by judge or legislator, thus has an art side as well as a scientific aspect. There is, to be sure, a need for knowledge (of "higher" law, for example), but the human lawmaker is primarily a practitioner. He or she is required, through exercise of prudential judgment, to adapt to circumstances. A law may bind in conscience even if not logically implied in moral law, so long as it is prudentially elaborated by lawful authority and is not in conflict with divine command. The English common law, influenced more by lawyer and judge than academician and moralist, is a notable example. The judge or legislator must, of course, be faithful to what is known of revealed law, but God, in His providence, permits broad areas of discretion to His agents in adapting to special circumstances, whether it be a parent, a judge, a legislator or a bishop. A commentator upon the political thought of St. Thomas put it this way: "A good constitution and government was no more brought about by right views, good will and general friendliness than a thirteenth-century cathedral by an upsurging of religious aspiration; both were the works of artists applying the proper geometry, using the proper engines and ready to compromise, improvise and invent."²⁷

law may be contrary to human good in respect to its end ("as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory"), or in respect to the author ("as when a man makes a law that goes beyond the power committed to him"), or in respect to the form ("as when burdens are imposed unequally on the community"). Such laws do not bind in conscience, "except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right." Laws contrary to divine good do not bind in conscience and should not be obeyed. He writes: "[L]aws may be unjust through being opposed to the Divine good: such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law: and laws of this kind must nowise be observed, because, as stated in Acts v. 29, *we ought to obey God rather than men.*" AQUINAS, *supra* note 19, at I-II, Q. 96, art. 4.

²⁵ AQUINAS, *supra* note 19, at I-II, Q. 95, art. 2.

²⁶ *Id.*

²⁷ THOMAS GILBY, *THE POLITICAL THOUGHT OF THOMAS AQUINAS* 234 (1958).

Those who are called to practice the difficult arts of human governance and lawmaking must approach the task with humility. As St. Thomas cautioned, human law should not command all virtuous acts,²⁸ nor seek to suppress all vices.²⁹ There are definite limits as to what law can and should do, and we must be mindful that perfect justice is not to be achieved in this world.³⁰

God has not given us a detailed legal blueprint. As noted, particular determinations and applications of revealed law are to be made by human agents. God executes His plan through others; His government is mediated through individuals and institutions—family, state, church, school and so on. But since their power derives from Him, they have limited authority and jurisdiction. This is extremely important in that it precludes the exercise of total power by a human agency and diffuses power throughout society.

It is commonplace in our time to ascribe sovereignty to the state. This is unscriptural. Only God is truly sovereign. Although the state has *real* authority, it does not have *total* authority. Throughout history it has most commonly been the state which has claimed the authority and jurisdiction which belong only to God. When it does, it, in effect, claims to *be* God! On the other hand, when the state operates within the scope of delegated authority it acts as God's *servant* or *minister*; it is literally involved in the administration of *His justice*.

"This concept of the law as a ministry of justice," R.J. Rushdoony has observed, "is all but forgotten today, and, where remembered, it is derided." He adds:

But it is all the same the only possible foundation for a just and prosperous social order. The law as a ministry lacks the arrogance of positivist legal theorists, who see no law or truth beyond themselves. Ministerial law is law under God: it is re-

28 AQUINAS, *supra* note 19, at I-II, Q. 96, art. 3.

29

Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and suchlike.

Id. at I-II, Q. 96, art. 2.

30 "The concept of *final judgment* relieved men of the psychological burden of the quest for perfect earthly justice." Gary North, *Imperfect Justice*, BIBLICAL ECONOMICS TODAY, Oct.-Nov. 1979, at 2.

quired to have a humility which positivist law cannot have. The champions of legal positivism are prone to accuse Christians of pride, but the world has never seen more ruthless arrogance and pride than that manifested by the relativists, whether of ancient Greece, the Renaissance, or of the twentieth century.³¹

There are, of course, differences among us respecting the structure and content of Christian jurisprudence, but surely we must all concede that the dominant legal thinking of our time is far removed from any authentic Christian outlook. One need do no more than refer to two recent decisions of the United States Supreme Court. Within a week's time, the Court ruled that it was unconstitutional to pray to God at a public school graduation ceremony and reaffirmed the constitutional right of mothers to kill their unborn babies.³² So, we cannot publicly acknowledge the God who is the source of all our rights, and it is permissible to kill a life which only He can create!

III. SAVIOR, YES: LORD, NO.

A negative response to any argument for the relevance of revelation to law and public policy is, unfortunately, not confined to those who flatly reject the Christian message. For there are many people who are receptive to the idea of Jesus Christ as *Savior* who experience difficulty with a necessary corollary, *viz.*, Jesus Christ as *Lord*. Here one confronts the commands of the Savior, His laws, stipulations as to how we are to live our lives and how society should be governed. Indeed, there are professing Christians who insist that Christian morality and law pertain exclusively to personal salvation and should in no way be authoritative or determinative in areas of public policy. This is implicitly a denial of God's sovereignty and opens the way for "other gods" to rule the world. There are, of course, no shortage of "other gods" eager to oblige. By this view Jesus may be one's personal "savior," but He is not "lord" or "king." Jesus is thus rendered irrelevant to the world, and Christian influence in worldly matters becomes weak and impotent.

The point may be illustrated by reference to the political thought of Jean Jacques Rousseau (1718-1778), who has been

31 R. J. RUSHDOONY, *THE INSTITUTES OF BIBLICAL LAW* 60 (1973).

32 *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992).

hailed as the "Father of the Modern World."³³ Rousseau's classic work, *The Social Contract*, was published in 1762. The "social contract," a *fictitious* contract which undergirds the entire political and governmental process, is the major presupposition of his system.³⁴ The clauses of the contract "may be reduced to one—the total alienation of each associate, together with all his rights, to the whole community."³⁵ Rousseau elaborates: "*Each of us puts his person and all his power in common under the supreme direction of the general will . . .*"³⁶

This association of contracting individuals is the sovereign, the absolute authority which is neither bound by nor subordinate to any other authority. Rousseau puts it this way: "But the body politic or the Sovereign, drawing its being wholly from the sanctity of the contract, can never bind itself, even to an outsider, to do anything derogatory to the original act, for instance to alienate any part of itself, or to submit to another Sovereign . . ."³⁷ (All "gods" are, by definition, jealous gods!) Moreover, he does not hesitate to underscore the coercive power of this sovereign. He writes:

In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free.³⁸

Another important attribute of this sovereignty, "the general will" of the contracting parties, is *infallibility*. Thus, as Rousseau notes, "It follows from what has gone before that the general will is always right . . ."³⁹ And, it goes without saying, that sovereign entity has *total* power:

As nature gives each man absolute power over all his members, the social compact gives the body politic absolute power over

33 THOMAS P. NEILL, *MAKERS OF THE MODERN MIND* 189 (1949).

34 The student of Contract law will, of course, recognize that a fictitious or *quasi*-contract is not really a contract at all.

35 THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE 218 (Clarence Morris ed., 1971).

36 *Id.*

37 *Id.* at 219.

38 *Id.*

39 *Id.* at 221. The "will of all" and the "general will" are not to be confused. It is obvious that within the overall system there must be an elite of some sort to declare the "general will," and there are to be no intermediate or "partial" authorities between the people and this supreme authority.

all its members also; and it is this power which, under the direction of the general will, bears, as I have said, the name of Sovereignty [T]he Sovereign is sole judge of what is important.⁴⁰

Despite a token reference here and there to God, there is clearly no room for God and His revealed word in Rousseau's grand scheme, which is essentially a *civil religion*, the same as all forms of totalitarianism, ancient and modern. Especially telling in this respect is how Rousseau seeks to put Christianity in its place: "Christianity as a religion is entirely spiritual, occupied solely with heavenly things; the country of the Christian is not of this world. He does his duty, indeed, but does it with profound indifference to the good or ill success of his cares."⁴¹ Thus, one may suppose, the Christian may pray and tend to his own private spiritual needs, but he may not venture to suggest that his religious principles should affect the laws of the state or any matter of public import. (We see this attitude in contemporary politicians who say they are "personally opposed to abortion, but")

To his credit, Rousseau did not back down from the logical implications of his premises:

There is therefore a purely civil profession of faith of which the Sovereign should fix the articles, not exactly as religious dogmas, but as social sentiments without which a man cannot be a good citizen or a faithful subject. While it can compel no one to believe them, it can banish from the State whoever does not believe them—it can banish him, not for impiety, but as an anti-social being, incapable of truly loving the laws and justice, and of sacrificing, at need, his life to his duty. If anyone, after publicly recognizing these dogmas, behaves as if he does not believe them, let him be punished by death: he has committed the worst of all crimes, that of lying before the law.⁴²

Under Rousseauian dogma, God is not truly sovereign; people are. The general will, not God's will, controls. Not "Thy will be done," but "our will be done." This is the same old conflict, repeated over and over in history from the rebellion of Adam to the

⁴⁰ *Id.*

⁴¹ *Id.* at 235.

⁴² *Id.* This celebrated oracle of Paris, who also wrote *EMILE*, what many regard as a classic in education, chose not to raise his own children. Against the wishes of the mother, Rousseau placed their five children in a foundling home. Neill, *supra* note 33, at 171.

present. Original sin is the prototype of all "humanistic" challenges to God's sovereign authority.

In Genesis we see God as ruler, as one who by sovereign decree has prescribed how His creatures are to act. But Adam rebels. He would, the Bible tells us, "be like gods who know what is good and what is bad."⁴³ "Know" in this context means to *determine for himself* what is good and what is bad.⁴⁴ Hence, Adam would make his own rules, his own laws. He denies God's ultimacy and would, in effect, become his own legislator, governor and judge.⁴⁵

IV. ONWARD TO VICTORY

In this protracted conflict, how goes the battle? One is tempted to agree with the poet:

God's world made a hopeful beginning,
but man marred his chances by sinning.
We trust that the story will end in God's glory.
But at present the other side's winning.⁴⁶

Humanistic thinking divorced from revelation is dominant in virtually every sphere, including the legal. For example, our Supreme Court deems it unlawful for a public school teacher to post a copy of the Ten Commandments in the classroom.⁴⁷ He or she may teach students how to use a latex condom, but is forbidden to even display a copy of God's basic laws which form the core of our traditional legal structure. Even where products of the traditional faith remain, their status is tenuous. Features of our public life such as "under God" in the Pledge of Allegiance and "In God We Trust" on our coins are evidently tolerated because through rote repetition they have lost any significant religious content.⁴⁸ "God save the United States and this Honorable Court!"

43 *Genesis* 3:5.

44 See, e.g., AQUINAS, *supra* note 19, at II-II, Q. 163, art. 2.

45 "What is the ultimate source of this inner division of man? His history of sin begins when he no longer acknowledges the Lord as his Creator and himself wishes to be the one who determines, with complete independence, what is good and what is evil. 'You will be like God, knowing good and evil' (*Gen. 3:5*): this was the first temptation, and it is echoed in all the other temptations to which man is more easily inclined to yield as a result of the original Fall." JOHN PAUL II, *supra* note 19, at para. 102.

46 I am indebted to my colleague, Robert Rodes, for this bit of verse. He does not recall where he read it. Perhaps he composed it himself.

47 *Stone v. Graham*, 449 U.S. 39 (1980).

48 See, e.g., *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992).

"The message of contemporary culture," Stephen Carter writes, "seems to be that it is perfectly all right to *believe* that stuff—we have freedom of conscience, folks can believe what they like—but you really ought to keep it to yourself, especially if your beliefs are the sort that cause you to act in ways that are . . . well . . . a bit unorthodox."⁴⁹ He adds: "The legal culture that guards the public square still seems most comfortable thinking of religion as a hobby, something done in privacy, something that mature, public-spirited adults do not use as the basis for politics."⁵⁰ To be heard in the public arena, including the law courts and the universities, one must be careful to clothe one's argument in secular garb. While it may be all right to accept the fruit, one dare not acknowledge the tree!

"Things fall apart," wrote the poet William Butler Yeats, "the centre cannot hold; Mere anarchy is loosed upon the world."⁵¹ We systematically exclude revelation from our public life, and yet express astonishment at the resultant devastation. And we continue to recycle humanistic proposals, naively hoping that somehow human virtue will be enhanced. C. S. Lewis identified the problem as follows: "We continue to clamour for those very qualities we are rendering impossible In a sort of ghastly simplicity we remove the organ and demand the function We castrate and bid the geldings be fruitful."⁵²

It is time we addressed some basic questions. For instance: "But what if Deuteronomy is true? What if it applies? What if this nation is under a covenant, and the terms of breaking his cove-

49 STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 25 (1993).

50 *Id.* at 54. See also RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984).

51 William Butler Yeats, *The Second Coming*.

52 C. S. LEWIS, *THE ABOLITION OF MAN* 16 (1947). In his famous Harvard commencement address, Alexander Solzhenitsyn described the decline in the West as follows:

How did the West decline from its triumphal march to its present sickness? . . . The West kept advancing socially in accordance with its proclaimed intentions, with the help of brilliant technological process. And all of a sudden it found itself in its present state of weakness. This means that the mistake must be at the root, at the very basis of human thinking in the past centuries. I refer to the prevailing Western view of the world which was first born during the Renaissance and found its political expression from the period of the Enlightenment. It became the basis for government and social science and could be defined as rationalistic humanism or humanistic autonomy: the proclaimed and enforced autonomy of man from any higher force above him. It could also be called anthropocentricity, with man seen as the center of everything that exists.

Alexander Solzhenitsyn, *A World Split Apart*, reprinted from WANDERER, July 6, 1978, at 10.

nant are those spelled out in Deuteronomy 28: 15-68? What then? *Judgment.*⁵³

Obedience or disobedience to God's law is presented in the Book of Deuteronomy as a life-or-death matter:

Here, then I have today set before you life and prosperity, death and doom. If you obey the commandments of the Lord, your God, which I enjoin on you today, loving him, and walking in his ways, and keeping his commandments, statutes and decrees, you will live and grow numerous; and the Lord, your God, will bless you in the land you are entering to occupy. If, however, you turn away your hearts and will not listen, but are led astray and adore and serve other gods, I tell you now that you will certainly perish; you will not have a long life in the land which you are crossing the Jordan to enter and occupy. I call heaven and earth today to witness against you: I have set before you life and death, the blessing and the curse. Choose life, then, that you and your descendants may live, by loving the Lord, your God, heeding his voice, and holding fast to him. For that will mean life for you, a long life for you to live in the land which the Lord swore he would give to your fathers Abraham, Isaac and Jacob.⁵⁴

We cannot escape reality. According to God's word, we obey and we are blessed; we disobey and we are cursed. His moral laws are just as objective as His physical laws. We may, of course, ignore a law of God or pretend that it does not exist. But we must still suffer the consequences of violation. It is, however, precisely this objective character that provides encouragement and hope. For the judgments are themselves therapeutic; they can have a healing effect.

Over a generation ago, an historian remarked that "[t]oday's world belongs to [Charles] Darwin, [Karl] Marx, and Sigmund Freud."⁵⁵ And so it did, in terms of apparent influence. But the times they are a changin'. Darwin's hypothesis is under serious attack,⁵⁶ Marxist influence is clearly on the wane, and, with increasing frequency, Freudian theories are being challenged.⁵⁷ There can be little doubt but that we are approaching the end of

53 Gary North, *1984, Not 1948*, CHRISTIAN RECONSTRUCTION, Jan.-Feb. 1982, at 2.

54 *Deut.* 30:15-20.

55 NEILL, *supra* note 33 at 320.

56 See, e.g., MICHAEL DENTON, *EVOLUTION: A THEORY IN CRISIS* (1985); PHILLIP E. JOHNSON, *DARWIN ON TRIAL* (1991).

57 See, e.g., E. FULLER TORREY, *FREUDIAN FRAUD: THE MALIGNANT EFFECT OF FREUD'S THEORY ON AMERICAN THOUGHT AND CULTURE* (1992).

an era, and we can anticipate fundamental changes in the way most people look at life and the world. What new paradigms will emerge we cannot know. But we can reasonably expect that as regards the question of origins it will be something other than a simple faith in biological evolution. With respect to history it will be something other than cultural evolution of the Marxist variety. And we will not expect psychological salvation 'à la Freud. Might we not expect fundamental changes in legal philosophy as well?

St. Paul summed up the hope that Christians should have as they view historical events and contemplate the future: "We know that God made all things work together for the good of those who have been called according to His decree."⁵⁸ Our Lord taught us to pray that God's will be done *on earth* as it is in Heaven, and He promised that the "gates of Hell" would not prevail against His Church.⁵⁹ The Christian's eschatological perspective (*i.e.*, view of the end, or last things) should be positive and optimistic, with the expectation of victory in time as well as eternity. St. Paul reassured the Church in Ephesus: "God has given us the wisdom to understand fully the mystery, the plan He was pleased to decree in Christ, to be carried out in the fullness of time; namely, to bring all things in the heavens and on earth into one under Christ's headship."⁶⁰ Christians need constant reminding of fact that "the universe, time, history, man and all things are the handiwork of a sovereign, omnipotent, omniscient, and triune God."⁶¹

In whatever we do, let it be with confidence in the name of the Father, and of the Son, and of the Holy Spirit!

⁵⁸ *Rom.* 8:28.

⁵⁹ Significantly, in the imagery of Matthew 16:18, it is the Church which is on the offensive, while Hell is in the hopeless, defensive position. Not vice versa. For good reason is the Church on earth referred to as the Church militant.

⁶⁰ *Eph.* 1:9-10.

⁶¹ R. J. RUSHDOONY, *THE BIBLICAL PHILOSOPHY OF HISTORY* 3 (1979).

